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IN THE

Supreme Court of the United States

October Term, 1970

No. 818

D. H. OVERMYER CO., INC., a New York corporation, D. H. OVERMYER CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation

and

THE SEAMAN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICKWAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK, and THE STATE TAX COMMISSION,

Petitioners,

against

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Can a third party intervene in an action as of right and as a party plaintiff for the sole purpose of alleging a claim against the plaintiff therein?

Can a proposed unverified intervenor complaint be considered in opposition to a motion for summary judgment?

Statement of the Case

The real issue before this Court is whether petitioner Green & White Construction Co., Inc. (hereinafter referred to as "Green & White") has been denied the right to assert an alleged claim against the respondents in the Courts below. The facts presented to the Courts below, and as they actually exist, are that Green & White attempted to intervene in the action to assert a non-meritorious claim against the respondents and that it was not until that attempt failed that petitioners D. H. Overmyer Co., Inc., a New York corporaion, and D. H. Overmyer Co., Inc., an Ohio corporation (hereinafter jointly referred to as the "Overmyer corporations"), then, for the first time, contended that the alleged claim of Green & White had been assigned to one of them on a date prior to the time that it had been asserted by Green & White in the within ection, and that the alleged claim was, in fact, that of the Overmyer corporations. Based on the papers submitted by the petitioners in this Court, it is difficult to determine to whom they claim the alleged cause of action belongs. Their use of the word "counterclaim" indicates that they now contend the alleged claim belongs to the Overmyer corporations. However, their use of this word may be an attempt to have this Court believe that their efforts to assert a counterclaim in the Courts below were denied when in fact the claim sought to be interposed was by way of intervention by Green & White, an affiliate corporation, who was not a party to the action.

In their attempt to convince this Court that they have been denied the right to assert their alleged claim, the Overmyer corporations have failed to recite all of the facts and have thereby distorted them. In addition, the actions and counteractions taken by the Overmyer corporations during the course of these proceedings make it evident their sole purpose and objective is to delay payment of a sum justly due and owing to the respondents.

Reasons for Denying the Writ

Facts

Respondents commenced this action on or about December 13, 1967 in the Supreme Court of the State of New York, County of Albany. The action was removed to the United States District Court for the Northern District of New York by the Overmyer corporations on or about December 30, 1967 (App. 3a).

By their complaint the respondents alleged that on February 21, 1967, petitioner Overmyer-Ohio entered into a written agreement whereby that petitioner agreed to issue thirteen promissory notes totalling $243,654.35, with interest at the rate of six percent per annum to settle an existing debt owed to the respondents (App. 3a).* Both the agreement and the notes provided that in the event of non-payment of any one of the notes for a period of sixty days all or any part of the remaining unpaid notes would become due and payable at the option of the holder of the notes.

The complaint further alleged that on May 23, 1967 Overmyer-New York made, executed and delivered to the respondents a certain second mortgage as collateral security for payment of $183,654.35, which was the principal amount of the serial notes then remaining unpaid, and that the mortgage, which was recorded in the office of the Clerk of the County of Albany on June 6, 1967, was on a certain described premises located in the County of Albany (App. 3a).

The complaint also alleged that Overmyer-Ohio was presented with the note due on September 20, 1967, but that payment was refused, and that by reason of this

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* References to the Appendix of the petitioners are designated by the prefix "App.". References to the Appendix of the respondents are designated by the prefix "RA".

refusal the then balance of $123,654.35 was due and owing (App. 3a).

By reason of the allegations of the complaint, the respondents sought foreclosure of the second mortgage furnished to them by Overmyer-New York (App. 21a-22a).

In lieu of answering the complaint, the Overmyer corporations moved to dismiss it. The basis for seeking the requested relief was the contention of the Overmyer corporations that (a) the defaulted note was not presented at the place designated in the note, and (b) the payee had not endorsed the note and therefore neither the Chemical Bank New York Trust Company branch located at 277 Park Avenue, New York, New York, the substituted place of payment by agreement of the parties, nor its notary was in any way authorized to demand or receive payment (App. 5a).

The Trial Court denied this motion and on the appeal the Court found the contention to be "so utterly trivial and unmeritorious as not to warrant statement" (App. 24a).

By notice of motion dated January 23, 1968, the Overmyer corporations moved to change the venue of the within action to the United States District Court for the District of Massachusetts. In support of that motion, the Overmyer corporations contended, in effect, that there had been a failure of consideration for the notes and the second mortgage furnished to the respondents in that the respondents negligently delegated to others the engineering services that they had agreed to perform on a Massachusetts project and that the persons to whom the work had been delegated did not perform the work in a proper, careful and skillful manner. The Overmyer corporations also contended that as a result of this alleged unprofessional and negligent misconduct by the respondents and

their agents, Green & White commenced an action in the United States District Court for the District of Massachusetts to recover damages in which action Overmyer-New York had joined to seek an injunction against the mortgage foreclosure (App. 24a-25a).

The respondents opposed the change of venue motion of the Overmyer corporations noting that under both New York and federal practice the within action which is to foreclose a mortgage, is a local action which must be brought in the county where the property is located, i.e., the County of Albany (App. 5a-6a).

The respondents also noted that the claim alleged in the complaint in the District of Massachusetts action and referred to above was by Green & White and that the only relief sought by Overmyer-New York in that action was to enjoin certain of the respondents herein from prosecuting the within action.

By notice of Cross-Motion dated June 10, 1968, the respondents moved for summary judgment. In support of that motion the respondents noted that they are professional engineers who rendered professional services to Green & White in connection with numerous construction projects throughout the country for which they had not received payment and that in approximately January, 1967 the amount owed to them by Green & White was $243,543.35. Negotiations between counsel for the respondents and counsel for the Overmyer corporations resulted in settlement of the debt, which settlement was confirmed by letter agreement dated February 21, 1967. By that agreement Overmyer-Ohio agreed to issue thirteen serial notes totalling the full amount owed. All of the notes contained an acceleration provision which, at the option of the respondents, made all unpaid notes due and payable within sixty days from default in payment of any one of the notes on its due date (RA8-10).

The letter agreement also provided that as security for the debt respondents would be furnished with a second mortgage on real estate to the full extent of the debt and that the only lien against the real estate would be a first mortgage (RA9).

On May 23, 1967, pursuant to the terms of the letter agreement, the respondents received a second mortgage, which is the subject matter of this litigation (RA11-16).

In support of their motion for summary judgment, the respondents also indicated that in approximately March, 1968, the respondents herein who were named as defendants in the Massachusetts action moved to dismiss the Massachusetts complaint claiming (a) insufficiency of process; (b) failure to join parties; and (c) failure to state a claim. On April 8, 1968, the Massachusetts Court granted the motion on two separate grounds. It held that the respondents herein who were named and served as defendants in that action did not constitute the entire partnership and therefore could not be sued as a partnership. The Court also held that the cause of action alleged by Overmyer-New York did not state a claim against the respondent partnership (App. 7a, 25a).

On or about May 3, 1968, both Green & White and Overmyer-New York moved in the Massachusetts action to amend their complaint to add all of the members of the respondent partnership as defendants. The Court, by order entered on June 15, 1968, granted the motion to amend as to Green & White, but denied the motion as to Overmyer-New York stating that its claim had been dismissed by the prior order of April 8, 1968, referred to above (App. 7a, 25a).

Thus, as of June 15, 1968, Green & White had an action pending against the respondents herein in the District of Massachusetts. However, the Overmyer corporations ob-

viously felt that the existence of the Massachusetts action would not assist them in their attempts to avoid the mortgage foreclosure and they subsequently had the Massachusetts action voluntarily discontinued (App. 26a).

In opposing the cross-motion for summary judgment, the Overmyer corporations through their secretary and general counsel presented two arguments, the first of which was that the secretary and general counsel of those corporations, who had agreed to change the place of payment of the underlying notes did so without corporate authority. The second argument amounted to nothing more than a brief recital of the facts alleged in the complaint in the Massachusetts action, i.e. that the respondents did not participate in or supervise the work on the Massachusetts project but left it to be performed by others who performed in a negligent and careless manner (App. 25a).

After the respondents cross-moved for summary judgment, Green & White moved to intervene as a plaintiff in the within action. Its proposed complaint asserted the same claim against the respondents herein as it had alleged in the Massachusetts action (App. 25a). In that notice of motion Green & White stated that its interests could not be adequately represented by the existing parties and that by reason thereof disposition of the action without its intervention will or might destroy its ability to protect its interests (App. 13a). Other than its notice of motion, the only other paper submitted in support of the motion was the proposed complaint which was almost identical to the complaint in the Massachusetts action.

It should be noted that the Overmyer corporations and Green & White, the applicant for intervention, were separate and distinct corporate entities and, despite the fact that they might be related, a possible unrelated cause

of action in favor of one cannot be used to defeat the rights of the respondents. In seeking to intervene, Green & White was apparently under the impression that an alleged cause of action of Green & White in some manner inured to the benefit of the Overmyer corporations.

The lack of relationship between the alleged claim of Green & White and the claim of the Overmyer corporations was admitted in the intervention papers of Green & White in that the basis for seeking intervention was that its "interest cannot be adequately represented by existing parties" (App. 13a). If there was any relationship between the two claims the interests of Green & White would obviously be protected in that the attorneys representing the Overmyer corporations were absolutely identical to the attorneys who made the motion to intervene on behalf of Green & White. Under these circumstances Green & White did not qualify to intervene as a matter of right and it also failed to qualify for intervention by permission.

In addition to filing a notice of appeal from the order of the Court below dated and filed on November 20, 1969, the proposed intervenor, Green & White, made a motion for a rehearing of its motion to intervene (App. 25a-26a). In support of that motion Green & White contended that it had voluntarily discontinued the action that it had pending in Massachusetts against the respondents, and that one of the reasons for discontinuing the action was that it was impossible to serve all of the respondents in Massachusetts as they were a partnership and by law all of them were necessary parties to the action and each had to be served (App. 26a). In support of that motion Green & White also reiterated in summary fashion the allegations set forth in the proposed complaint.

The moving papers submitted by Green & White on that motion are, on their face, pure sham and without

merit, either in fact or in law. There is absolutely no principle of law that requires all members of a partnership to be served before a court can obtain jurisdiction over the partnership. Section 310 of the Civil Practice Law and Rules of the State of New York provides that service on one of the partners gives personal jurisdiction over the partnership. In addition, Chapter 227 of the General Laws of Massachusetts, Section 5, which is one of the several sections dealing with jurisdiction over partnerships, provides that foreign partnerships are deemed to have appointed the Secretary of State as their agent for service if the partnership fails to appoint an agent.

In addition, the Courts below were totally familiar with the pleadings and proceedings that transpired in the Massachusetts action on the original motion of Green & White to intervene. Obviously, what petitioners herein were attempting to accomplish was to confuse the issues and jump back and forth from one court to another, depending on which best served their purposes. If Green & White was sincere in its efforts to pursue its alleged claim against the respondents, it would have effected service upon the partnership and continued with the prosecution of the Massachusetts action.

As noted, *supra*, the order of the Massachusetts Court permitting Green & White to amend its complaint to include all of the respondents was entered on June 15, 1968. The motion which Green & White sought renewal of was not decided by the Court below until November 20, 1969, approximately one and one-half years later. Clearly, Green & White knew what course of action it intended to pursue prior to the order of November 20, 1969. Yet, nothing was done to advise the Court below of this decision. The obvious reason for this failure to act by Green & White was to first determine what action the Court below would take on its motion to intervene and then take the position which best suited its purposes.

After hearing argument on the motion by Green & White for a rehearing of its motion to intervene, the Court below granted the motion for a rehearing but, upon rehearing, adhered to its original decision as expressed in its Memorandum-Decision and Order dated and filed on November 20, 1969 (App. 10a). The Court also directed that an order be settled in accordance with its decision. The attorney representing Green & White agreed to prepare the proposed order and, in complete disregard of the direction of the Court below, served and filed a proposed order which provided for service and filing of an answer containing counterclaims by the Overmyer corporations within ten days from the filing of the order.

In support of the proposed order the Overmyer corporations submitted an affidavit, the thrust of which was that in or about February, 1968, Overmyer-Ohio assumed the liabilities of Green & White and thereby became entitled to the receivables and other claims of Green & White (App. 26a). The stated reason for not making this contention known until after the submission of numerous affidavits and other documents flatly stating that the claim against the respondents was one that belonged to Green & White, was that ". . . it was decided to leave the claim against W-C-S [the respondents] in the name of Green & White because the motions made by Overmyer relieved it of the necessity of serving an answer to the complaint which would then have had to include all known counterclaims" (RA20). Thus, the petitioners herein were asserting, in effect, that they could vacillate back and forth with respect to the true party in interest and completely disregard the facts as they actually existed.

It would seem apparent that the position taken by the petitioners herein on the settlement of the order in question was purely and simply an afterthought and just another attempt by them to delay payment to the respond-

ents. This assumption is supported by the fact that the petitioners made absolutely no effort to produce a copy of the alleged resolution by which Overmyer-Ohio assumed the liabilities of Green & White and allegedly thereby became entitled to its receivables and claims.

In the affidavit submitted in support of the proposed order, the petitioners herein also lamented the fact that the Court below decided all of the motions pending before it at the same time (RA20). To the contrary, it would be strange and indeed unusual for a court to follow any other procedure. There was absolutely no reason for the Court below to decide these motions separately and, as a matter of fact, it was to the advantage of the Overmyer corporations for the Court to decide all of the motions at one time as they had failed to present one shred of evidence to defeat the motion of the respondents for summary judgment, other than the belated and concocted claim of Green & White to intervene.

It should also be noted that since the entry of the orders in the Courts below, Overmyer-Ohio, individually and as alleged assignee of Green & White and others, commenced an action in the Supreme Court of the State of New York, County of New York, against the respondents herein. One of the causes of action set forth in the complaint (first cause of action) seeks to recover damages for the same alleged acts of the respondents herein as were alleged in the proposed intervenor complaint of Green & White (RA23-25). Clearly, by the commencement of that action, petitioners herein have demonstrated that there was no basis to the proposed intervenor complaint that Green & White sought to allege in the within action. By its complaint in the New York action, Overmyer-Ohio is apparently now taking the position that the alleged claim belonged to it and not to Green & White, and has impliedly admitted that the Courts below properly denied the motion of Green & White to intervene.

ARGUMENT

POINT I

The Court below properly denied the motion of Green & White to intervene as of right in the within action.

Rule 24 of the Federal Rules of Civil Procedure provides in applicable part as follows:

> "(a). *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action. . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

It is respectfully submitted that Green & White does not meet any of the requirements set forth in Rule 24. First of all, it is clear that the interests of Green & White were adequately represented by the Overmyer corporations. Not only are the Overmyer corporations affiliates of Green & White, but, in addition, the same attorneys represented both of them in the Courts below. That intervention should be denied under these circumstances was stated by the Court in the case of *Farmland Irrigation Co.* v. *Dopplmaier*, 220 F. 2d 247 (9 Cir. 1955) as follows:

> "The other requirement of Rule 24(a) is a showing by an applicant for intervention that the representation of his interest by existing parties is or may be inadequate. On this point Moore states: 'Inadequacy of representation is shown if there is proof

of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the applicant for intervention, or fails because of nonfeasance of his duty of representation.' See also comments of Moore and Levion the right to intervene under former Equity Rule 37 in 45 Yale L. Journal 565, 592. An example of adverse interest is found in the case of United States v. C. M. Lane Lifeboat Co., Inc., D. C. N. Y., 1938, 25 F. Suppl. 410, 411, where the court found inadequate representation because the applicant for intervention and the attorney representing his interests were not on friendly terms.

"In the case at bar, the appellant makes no charge of fraud or collusion nor does it charge Stout with an adverse interest. Comparing the answer of Stout with the answer that appellant filed with its motion to intervene, it is clear that the same defense will be presented whether or not the appellant is a formal party to the record. Indeed, not only would the defense of appellant be the same as Stout's, but also the attorneys who would present the defense. In addition, the docket entries reveal that these attorneys have diligently pursued the defense of the action on behalf of Stout, which negatives any possible contention of nonfeasance."

Also see, *Stadin* v. *Union Electric Company, et al.*, 309 F. 2d 912 (8th Cir. 1962) and *S. C. Johnson & Son, Inc.* v. *Boe*, 187 F. Supp. 517 (U. S. D. C. E. D. Pa. 1960).

In addition, the proposed intervenor complaint of Green & White clearly demonstrates that Green & White has no interest and claimed no interest in the cause of action commenced by the respondents. The only interest that Green & White had was with respect to its proposed claim. Such an interest has been held to be insufficient to support

a contention by an applicant for intervention that his interest is inadequately represented. In this connection the Court in the *Dopplmaier* case, *supra*, stated as follows:

> "The pleadings filed by appellant with its motion to intervene included a counterclaim in which it is alleged that a justifiable controversy exists between Farmland and Dopplmaier in that Dopplmaier has failed and refused to recognize Farmland as the successor to the rights of Stout under the license agreement referred to above. Applicant asserts that it is for the purpose of securing adjudication of that issue that it seeks to intervene, since it cannot secure such adjudication without intervention even by openly and avowedly controlling the defense of Stout. It is too clear for argument that the question of whether appellant is entitled to be adjudged successor to Stout is separate and distinct from the question of whether moneys are owing to Dopplmaier under his claim for an accounting. If the appellant were entitled to intervene because of inadequate representation of its interest in appellee's claim for an accounting, it might be that the issue raised in its counterclaim could be adjudged in the same proceeding. But it is the inadequate representation of its interest in the claim for an accounting, and not its interest in the counterclaim, that gives rise in the first instance to the right to intervene, for it is with respect to only such former interest that a judgment could result by which the appellant would be bound."

It should also be noted that notwithstanding the fact that Green & White sought to intervene as a plaintiff, its true purpose in seeking intervention was to support the position of the Overmyer corporations. This is made abundantly clear from the proposed intervenor complaint which contains nothing more than a claim against the

respondents. In the case of *Carey, Baxter & Kennedy, Inc.* v. *Wilshire Oil Company of Texas*, 346 F. 2d 110 (10th Cir. 1965), the Court held that such an interest in a pending action is insufficient to permit intervention, stating:

> "The significant fact here is that C.B.K. seeks to intervene on the side of the defendants.
>
> "C.B.K. does not assert a claim to the damages which Wilshire has demanded. They merely try to bolster the defense of Riffe and the only interest that C.B.K. has is indirect. If Riffe and Felts are made to respond in damages it could conceivably affect the relationship between C.B.K. and these defendants. Is such an indirect interest sufficient? We think not. The interests are those of Riffe and Felts, and not of C.B.K. The fact that C.B.K. also asserts a counterclaim is not a factor in assessing its right to intervene under Rule 24(a)."

A reading of the original motion by Green & White to intervene in the within action clearly demonstrates that it sought to intervene as a matter of right under Rule 24(a), Federal Rules of Civil Procedure, and did not seek intervention by permission of the Court under Rule 24(b), Federal Rules of Civil Procedure.

Even if Green & White's original motion to intervene could be considered as a motion to intervene by permission of the Court, it was properly denied. As is noted *supra*, the only interest of Green & White in this action is to use it as a vehicle for asserting a claim against the respondents. The courts have consistently denied intervention under such circumstances. *Kauffman* v. *Kebert*, 16 F. R. D. 225, aff'd 219 F. 2d 113 (3 Cir. 1955); Moore on *Federal Practice*, Vol. 4, par. 24.17 p. 126.

Intervention was also properly denied Green & White because at the time it made its motion to intervene it had a prior action pending against the respondents for the same claim. Green & White commenced an action against the respondents in the United States District Court for the District of Massachusetts on or about September 18, 1967, in which it alleged the identical claim pleaded in its proposed intervenor complaint. The within action was commenced by the respondents against the Overmyer Corporations in December, 1967, and the application of Green & White to intervene herein was not made until approximately October 11, 1968. Thus, the Massachusetts action commenced by Green & White against the respondents was commenced prior to the within action and for this reason the motion to intervene was properly denied. Such was the holding in *S. C. Johnson & Son, Inc.* v. *Boe, supra,* where the Court stated in part as follows:

> "Of more vital significance, however, is the fact that applicant's interest will be fully protected by virtue of the fact that they are defendants in the New York suit involving the same issues."

See also *Cresta Blanca Wine Co., Inc.* v. *Eastern Wine Corporation,* 143 F. 2d 1012 (2 Cir. 1944); and *Isbrandtsen Co.* v. *S. S. Kokoh Maru,* 263 F. Supp. 784 (U. S. D. C. S. D. N. Y. 1966).

POINT II

The motion of Green & White to intervene and the proposed intervenor complaint of Green & White could not be considered in opposition to the cross-motion for summary judgment.

Rule 56(e) of the Federal Rules of Civil Procedure provides as follows:

> "*Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall

> be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

It is respectfully submitted that this Rule expressly prohibits courts from considering the motion to intervene or the proposed intervenor complaint in ruling on a motion for summary judgment. It is obvious that the sole purpose of Green & White in seeking intervention was to prevent the cross-motion of the respondents for summary judgment and was an attempt by the Overmyer corporations to use the unsworn and unverified statements of the proposed intervenor complaint in opposition to the cross-motion for summary judgment.

It is further submitted that if there was any validity to the claims made in the proposed intervenor complaint of Green & White, the Overmyer corporations would have submitted competent evidence by way of affidavits, contracts and other documents to substantiate their contentions. Knowing that they could not produce such evidence

because it did not in fact exist, the Overmyer corporations attempted to accomplish by indirection what they were expressly prohibited from doing directly.

Thus, in view of the fact that the Overmyer corporations did not raise any issues of fact in the Court below, it had no alternative but to grant the cross-motion for summary judgment.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari on the ground that it has no basis in fact or law.

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